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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

(2)

No. 89-1929

LOUIS W. SULLIVAN, SECRETARY OF
U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES

PETITIONER

v.

COMMONWEALTH OF MASSACHUSETTS, ET AL.

RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

RESPONDENTS' MOTION TO CONSOLIDATE
WITH RUST V. SULLIVAN, NOS. 89-1391/1392

On June 11, 1990, the Solicitor General filed a petition for a writ of certiorari in this case, and suggested that the Court hold the petition pending the Court's decision in Rust v. Sullivan, Nos. 89-1391/1392, in which the Court granted certiorari less than two weeks ago, on May 29, 1990. Respondents believe that the writ of certiorari in this case should be granted immediately, and that this case should be consolidated with Rust v. Sullivan. The reasons for granting respondents' motion to consolidate are as follows:

1. Like Rust v. Sullivan, this case challenges the statutory and constitutional validity of regulations promulgated by the Secretary of Health and Human Services pursuant to Title X of the Public Health Service Act, 42 U.S.C. § 300 et seq. Those regulations prohibit clinics receiving Title X funds from counseling and referring, with respect to abortion, require physical and financial separation of Title X projects from activities prohibited by Title X, and forbid Title X clinics from engaging in advocacy for abortion. In Rust, the district court and the Second Circuit denied relief and dismissed plaintiff's complaint; in this case, the district court issued a nationwide injunction against the regulations, and the First Circuit affirmed en banc. Massachusetts v. Secretary of HHS, 899 F.2d 53 (1st Cir. 1990).[1]

2. While this case challenges the same regulations challenged in Rust v. Sullivan, it poses several issues that the Second Circuit did not reach, and therefore consolidation will give the Court the benefit of a full presentation in one case of all issues raised by the regulations.

3. The first issue addressed by the First Circuit but not reached in the Second Circuit concerns the

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[1] The injunction was issued not only with respect to all direct plaintiffs but on behalf of all of the members of NFPRHA. See discussion of NFPRHA in ¶ 6 infra.

effect of the challenged regulations on private fee-paying patients. The Second Circuit in New York v. Sullivan, 889 F.2d 401, 413-414 (2d Cir. 1989), acknowledged that this issue might alter the result, specifically qualifying its decision by stating:

> the present action does not pose the issues that might arise if a doctor were to treat private patients in an entity that receives Title X funds.... Whether this issue arises in the context of Title X clinics is not clear on the present record, and we do not reach it.

The en banc First Circuit, by contrast, found that issue squarely presented by the record in this case, and based its ruling that the regulations are unconstitutional upon it. The First Circuit found that the regulations controlled the treatment of private patients in a Title X clinic. Commonwealth of Massachusetts v. Secretary of HHS, 899 F.2d at 72.[2] And it reasoned that:

> because most Title X clients pay a portion of the cost of the services (based on a sliding scale), the client's ability to go elsewhere has been significantly diminished because she has already paid what she could afford to the Title X clinic.

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[2] The record supports the en banc court's determination that the issue was properly presented. An affidavit submitted by Karen Cody Carlson, Executive Director of Planned Parenthood of Greater Kansas City, a Title X recipient, states that "approximately 65% of the 15,000 clients seen last year received at least some subsidization under Title X." Affidavit of Karen Cody Carlson at ¶ 5. Thus, 35% of their clients were private paying patients. See also note 3 infra.

Id. at 70. Thus, if the Court consolidates the cases, the critical issue of the effect of the challenged restrictions on private paying patients will be properly presented in a posture in which it has been ruled upon by the Court of Appeals.

4. The second issue addressed by the First Circuit but not by the Second Circuit concerns the effect of the challenged restrictions on a Title X clinic's privately-generated funds. As the First Circuit pointed out, the Second Circuit in New York v. Sullivan:

> ignored the fact that private money ('matching funds') is tied up and held hostage to the same restrictions as Title X funds because of the new definition of the 'Title X program' in the regulations. Its opinion treats the regulations as if they only applied to federal money without also placing significant conditions on matching funds.

Commonwealth of Massachusetts v. Secretary of HHS, 899 F.2d at 71.

The First Circuit squarely addressed the issue of the regulations' restrictions on non-federal funds, id. at 71-72, and found it particularly critical to its First Amendment analysis, as did this Court in FCC v. League of Women Voters, 468 U.S. 364 (1984). Id. at 73-74.[3]

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[3] See Commonwealth of Massachusetts v. Secretary of HHS, 899 F.2d at 73 n.11 (relying on the Secretary's admission that the "federal government provides only about

(footnote continued on following page)

Accordingly, consolidation will permit the Court to consider the issue of the regulations' impact on non-federal funds with the benefit of the First Circuit record.

5. As the Solicitor General's petition demonstrates, this case also presents a third issue which the First Circuit addressed but the Second Circuit "did not

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50% of the money supporting federally funded family planning projects," and noting "affidavits in the case show that some family planning organizations receive as little as 9% of their total operating budget from Title X"). The record basis for the First Circuit's treatment of this issue includes the following:

(1) The district court found that the regulations "significantly restrict a [Title X] project's use of both federal, and non-federal, money." Commonwealth of Massachusetts v. Bowen, 679 F.Supp. 137, 140 (D. Mass. 1988); id. at 144 (regulations "put the use of matching funds and the income from fee paying clients under the same restrictions as funds appropriated by Congress"). The Secretary conceded in his appeal briefs to the First Circuit that the regulations restrict not merely federal funds but also "matching funds and grant-related funds." Brief for the Appellant at 19 n.13; Supplemental Brief for the Appellant at 18 n.11 (admitting that regulations restrict "fees generated by a Title X project" as well as federal funds).

(2) Affidavits submitted by various clinic directors established that the plaintiff clinics in fact receive both federal funding and non-federal fees, and therefore would be subject to the admitted restriction on private funds. Affidavit of Leslie Laurie at ¶ 4 (Family Planning Council of Western Massachusetts receives 40% of its budget from Title X funding); Affidavit of Diane M. Booth at ¶ 4 (Planned Parenthood of Central Missouri receives 17% of its budget from Title X funding); Affidavit of Karen Cody Carlson at ¶¶ 4, 5 (Planned Parenthood of Greater Kansas City receives 9% of its budget from Title X funding, and services both subsidized and paying clients). Cf. Affidavit of George W. Morley at ¶ 20 ("the regulations will impose heavy financial burdens on Title X health care providers").

reach": severability. Pet. at 9. While the Solicitor General suggests that the Court might decide that issue in the first instance in Rust, it would certainly be better informed if it were reviewing a case in which the issue arose and was decided by the Court of Appeals. In addition, the Secretary's silence on this issue in the First Circuit, see 899 F.2d at 76, may prove relevant to a severability inquiry, since if the Secretary felt that the regulations were severable, he had every opportunity to say so in the First Circuit en banc briefing and argument. Thus, the First Circuit record will be instructive should this issue arise.

6. Finally, this case is also different in terms of the parties involved and the scope of relief obtained. The plaintiffs in the First Circuit case include the National Family Planning and Reproductive Health Association, a non-profit membership corporation which sued on behalf of certain of its members which in fiscal year 1989 included 65 of the 85 Title X grantees that received and administered approximately 82% of Title X grant funds.[4] Accordingly, the injunction granted by the district court

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[4] In bringing the action, NFPRHA explicitly excluded from its representation those members that were being represented in other related actions. If those excluded members are counted, in fiscal year 1989, NFPRHA members received 75 of the 85 Title X grants and approximately 94% of Title X funding.

and affirmed by the en banc First Circuit, by encompassing NFPRHA's membership, was national in scope. In addition, plaintiffs in this case include Mary Moe, an individual indigent woman dependent upon a Title X clinic whose constitutional rights are directly affected by the challenged regulations. The Rust case has no individual women plaintiffs.

For all of the above reasons, respondents respectfully request that the Court grant the writ of certiorari and consolidate this case with Rust v. Sullivan.

Respectfully submitted,

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Date: June 12, 1990

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No. 89-1929

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PETITIONER

v.

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RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Respondents' Motion to Consolidate with Rust v. Sullivan, Nos. 89-1391/1392 was hand-delivered this 12th day of June, 1990 to Kenneth W. Starr, Solicitor General, U.S. Department of Justice, 10th and Constitution Ave., N.W., Room 5614, Washington, D.C. 20530.

James L. Feldesman

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TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

MEMORANDUM IN RESPONSE TO
PETITION FOR A WRIT OF CERTIORARI

On June 11, 1990, the Solicitor General filed a petition for a writ of certiorari in this case, and suggested that the Court hold the petition pending its resolution of Rust v. Sullivan, Nos. 89-1391/1392. Respondents agree that the Court of Appeals' en banc decision in this case conflicts with the Second Circuit's decision in New York v. Sullivan, 889 F.2d 401 (2d Cir. 1989), cert. granted sub nom. Rust v. Sullivan, Nos. 89-1391/1392 (May 29, 1990). In light of the Court's grant of a writ of certiorari in Rust, and for the reasons presented

in our Motion to Consolidate filed simultaneously with this Memorandum, respondents believe that the Court should grant the writ of certiorari and order this case consolidated with Rust v. Sullivan.

Respectfully submitted,

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James L. Feldesman